

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID LAWRENCE WILSON,
Plaintiff,
v.
WAL-MART STORES INC.,
Defendants.

Case No. 2:13-cv-00207-RFB-PAL

ORDER

I. INTRODUCTION

In this product liability action, Plaintiff David Lawrence Wilson claims that he was injured by a piece of metal he bit into while eating ice cream he purchased from Defendant Wal-Mart Stores, Inc. ("Wal-Mart"). The case is now before the Court at the summary judgment stage. Wal-Mart argues that Wilson has produced no evidence to support his claim. Wilson argues that he has produced such evidence and also seeks to amend his complaint to add the manufacturer of the ice cream as a defendant. The Court concludes that Wilson has not established a basis for amending his complaint and has not produced any evidence of certain essential elements of his products liability claim. Therefore, and for the reasons discussed below, the Court denies Wilson's Motion to Amend Complaint, grants Wal-Mart's Motion for Summary Judgment, and orders that judgment be entered in favor of Wal-Mart.

II. BACKGROUND

A. Procedural History

Wilson filed his original Complaint on February 7, 2013, and has twice amended his complaint. The operative complaint in this action is Wilson's Second Amended Complaint filed

1 on May 12, 2014, in which he alleges two causes of action against Wal-Mart for strict product
2 liability and loss of consortium. ECF No. 42. A Scheduling Order was entered on August 7, 2014,
3 setting the deadline to amend pleadings at October 10, 2014 and the discovery cutoff at January
4 10, 2015. ECF No. 60.

5 On January 20, 2015, Wilson filed a Motion to Add Wells Enterprises, Inc., the
6 manufacturer of the ice cream giving rise to this case, as a Defendant. ECF No. 62. The Honorable
7 Peggy A. Leen, United States Magistrate Judge, denied Mr. Wilson's motion on March 4, 2015.
8 ECF No. 74. Wal-Mart filed a Motion for Summary Judgment on February 9, 2015, and Wilson
9 filed a Motion for Leave to File Amended Complaint on March 13, 2015. ECF No. 67, 76.

10 On January 27, 2016, the Court held a hearing and oral argument on several outstanding
11 motions, including Wilson's Motion to Amend Complaint and Wal-Mart's Motion for Summary
12 Judgment. ECF No. 85. The Court took the motions under submission and stated that it would
13 issue a written order with its rulings. Id. On March 30, 2016, the Court denied Wilson's Motion to
14 Amend Complaint, granted Wal-Mart's Motion for Summary Judgment, denied the remaining
15 pending motions as moot, and stated that a written order would issue. ECF No. 87. This Order sets
16 forth the Court's reasoning for its rulings.

17 18 **B. Facts**

19 The parties dispute the relevant facts in this case. In his deposition, Wilson testified to the
20 following facts. On February 10, 2011, Wilson purchased two cartons of ice cream from Wal-
21 Mart.¹ Two or three days later, Wilson opened one of the cartons of ice cream, which he had been
22 keeping in the freezer in his apartment. He took a bowl from his cupboard, placed it in the freezer,
23 and served some ice cream into the bowl. While he was eating the ice cream, he bit into a piece of
24 metal and felt a sharp pain in one of his teeth. Wilson shared his apartment with a roommate,
25 known by the name of Jack. There were also several other people who frequently spent time in the
26 apartment, none of whom were present at the time. Immediately after biting into the metal, Wilson

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28 ¹ This fact is corroborated by Wilson's production of a receipt showing the purchase of two
cartons of ice cream, paid in cash, from a Wal-Mart on February 10, 2011.

1 spit it out and showed it to Jack. Wilson took pictures of the metal object the day of the incident
2 and stored the ice cream in the freezer with a sign telling others not to remove the ice cream.
3 Wilson was subsequently incarcerated for several months. When he returned to his apartment, the
4 ice cream carton was gone from the freezer and Jack was nowhere to be found.

5 Wilson produced evidence that he was seen by a dentist in March 2012, approximately one
6 year after the subject incident. The dentist concluded that Mr. Wilson suffered broken lingual cusps
7 on one of his teeth and that this injury could have been caused by eating or biting.

8 Wal-Mart does not dispute that the existence of a receipt showing that an individual
9 purchased ice cream from one of its stores on February 10, 2011. However, Wal-Mart disputes the
10 remainder of the facts recounted by Wilson. Specifically, Wal-Mart disputes the following facts:
11 whether the subject ice cream was sold by Wal-Mart; whether the subject ice cream contained any
12 metal or other defects; whether the subject ice cream had previously been opened or tampered with
13 prior to Wilson biting into it; and whether Wilson suffered any injury from allegedly biting into
14 the ice cream.

15 While the parties dispute who made the purchase of ice cream from Wal-Mart on February
16 10, 2011 that is reflected on the receipt in the record, they do not dispute that that ice cream was
17 manufactured in Wells Enterprises' production facilities. The description and photographs of the
18 metal object Wilson allegedly bit into do not match any material used in Wells' production areas
19 or equipment used to manufacture ice cream.

21 **III. LEGAL STANDARD**

22 Summary judgment is appropriate when the pleadings, depositions, answers to
23 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
24 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
25 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In ruling on a
26 motion for summary judgment, the court views all facts and draws all inferences in the light most
27 favorable to the nonmoving party. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th
28 Cir. 2011).

1 Where the party seeking summary judgment does not have the ultimate burden of
2 persuasion at trial, it “has both the initial burden of production and the ultimate burden of
3 persuasion on a motion for summary judgment.” Nissan Fire & Marine Ins. Co., Ltd. v. Fritz
4 Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). “In order to carry its [initial] burden of
5 production, the moving party must either produce evidence negating an essential element of the
6 nonmoving party’s claim or defense or show that the nonmoving party does not have enough
7 evidence of an essential element to carry its ultimate burden of persuasion at trial.” Id. If it fails to
8 carry this initial burden, “the nonmoving party has no obligation to produce anything, even if the
9 nonmoving party would have the ultimate burden of persuasion at trial.” Id. at 1102-03. If the
10 movant has carried its initial burden, “the nonmoving party must produce evidence to support its
11 claim or defense.” Id. at 1103. In doing so, the nonmoving party “must do more than simply show
12 that there is some metaphysical doubt as to the material facts Where the record taken as a
13 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
14 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
15 marks omitted). However, the ultimate burden of persuasion on a motion for summary judgment
16 rests with the moving party, who must convince the court that no genuine issue of material fact
17 exists. Nissan Fire, 210 F.3d at 1102.

18 19 **IV. DISCUSSION**

20 After reviewing the parties’ briefs and exhibits, the Court concludes that Wilson’s Motion
21 to Amend Complaint must be denied because he has not shown any basis for reconsideration of
22 Judge Leen’s Order denying his earlier motion. The Court also concludes that Wal-Mart’s Motion
23 for Summary Judgment must be granted. Wilson has not produced any evidence establishing the
24 material elements of his claims.

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A. Wilson's Motion to Amend Complaint

1. Applicable law

Wilson filed a Motion to Amend Complaint approximately one week after Judge Leen issued an Order denying his earlier motion to add Wells Enterprises as a defendant. ECF Nos. 74, 76. In his Motion to Amend, Wilson reasserts the same arguments he made in his earlier motion that was denied by Judge Leen. Therefore, the Court construes Wilson's motion as a request for reconsideration of Judge Leen's ruling. See Andersen v. United States, 298 F.3d 804, 807 (9th Cir. 2002) ("The substance of the motion, not its form, controls its disposition.").

A district judge may reconsider any pretrial order of a magistrate judge if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). "A finding is clearly erroneous when[,] although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 622 (1993) (internal quotation marks omitted). The district judge "may affirm, reverse, or modify" the ruling of the magistrate judge, or remand the ruling to the magistrate judge with instructions. D. Nev. R. IB 3-2.

2. Wilson's Motion to Amend Complaint Is Denied

After review of Wilson's motion and supporting documents, the Court does not find that Judge Leen's order was clearly erroneous or contrary to law.

In her Order, Judge Leen found that Wilson's requests to amend his complaint and to amend the scheduling order were untimely and that Wilson had not shown good cause or excusable neglect that would warrant granting the untimely requests. Judge Leen also found that Wal-Mart timely and appropriately responded to the interrogatories propounded to it by Wilson and that Wal-Mart served Wilson with a Certificate of Interested Parties identifying Wells Enterprises as an interested party several months before the expiration of the deadline to amend pleadings. In addition, Judge Leen found that Wilson had not adequately explained why he waited until September 10, 2014 to serve Wal-Mart with a discovery request to identify the manufacturer of the ice cream listed on the receipt, or why he waited more than three months to move to amend his complaint after he received Wal-Mart's answer to that request in October 2014 identifying Wells

1 Enterprises as the manufacturer of that ice cream. Finally, Judge Leen found that granting the
2 motion to amend and to modify the scheduling order would prejudice Wal-Mart and that Wilson's
3 motion did not comply with the local rule requiring the proposed amended pleading to be attached
4 to such motions.

5 Judge Leen's Order shows that she clearly stated sufficient reasons for finding that Wilson
6 had not demonstrated the good cause or excusable neglect required for his motion to be granted.
7 Mr. Wilson does not present any additional evidence or legal authority to show that Judge Leen
8 committed a mistake or issued a ruling that was contrary to law. The only new argument he makes
9 is that he never received Wal-Mart's Certificate of Interested Parties and that therefore he had
10 never heard of Wells Enterprises until October 16, 2014, when he received Wal-Mart's responses
11 to his second set of interrogatories. The Court finds this unsworn statement to be insufficient to
12 demonstrate that Judge Leen committed clear error in finding that Wilson was served with the
13 Certificate of Interested Parties. Moreover, even if the Court were to credit Wilson's claim that he
14 never received the Certificate of Interested Parties, the Court still would deny Wilson's motion.
15 Even assuming that Wilson never knew of the existence of Wells Enterprises until October 16,
16 2014 (the date he received Wal-Mart's answer to his interrogatory identifying Wells Enterprises
17 as the ice cream manufacturer), the Court concurs with Judge Leen's finding that Wilson has not
18 shown good cause or excusable neglect for waiting for over three months after that date to file his
19 motion to amend the complaint.

20 The remainder of Wilson's arguments and evidence in support of his Motion to Amend
21 (which the Court construes as a motion for reconsideration) are merely restatements of what was
22 argued and presented before Judge Leen. Because the Court finds that Judge Leen's ruling that
23 Wilson did not meet his burden of showing good cause or excusable neglect was not clearly
24 erroneous or contrary to law, this motion is denied.

25 26 **B. Wal-Mart's Motion for Summary Judgment**

27 The Court now turns to Wal-Mart's Motion for Summary Judgment. After reviewing the
28 briefs filed in connection with this motion and the evidence in the record, the Court grants

1 summary judgment in favor of Wal-Mart on both of Wilson's claims. The Court notes that Wilson
2 withdrew his claim for loss of consortium at the hearing held on January 27, 2016. Therefore, the
3 Court only provides its analysis of Wilson's strict product liability claim.

4 ***1. Strict Product Liability***

5 In its motion, Wal-Mart argues that Wilson cannot produce any evidence to support any of
6 the elements of his strict product liability claim. To establish such a claim, the plaintiff must show
7 three things: (1) the product had a defect rendering it unreasonably dangerous; (2) the defect
8 existed at the time it left the defendant's control; and (3) the defect caused the plaintiff's injury.
9 Fyssakis v. Knight Equipment Corp., 826 P.2d 570, 571 (Nev. 1992). The Court finds that Wilson
10 has produced no evidence to establish the second and third elements of his product liability claim.

11 Wilson has produced evidence of the first element (the existence of a defect rendering the
12 product unreasonably dangerous). Wilson testified in his deposition that he purchased ice cream
13 from Wal-Mart and put it in his freezer without opening it. He also testified that two or three days
14 later, he opened the ice cream for the first time, served some into a bowl, and bit into a metal
15 object. Wal-Mart argues that Wilson has not ruled out other potential causes for the metal object
16 being in his bowl—for example, the other people that were in his apartment or the possibility that
17 the metal was already in the bowl when he served the ice cream into it. However, Wilson need not
18 rule out all other potential sources of the defect at this stage; it is enough that he produced evidence
19 from which a reasonable jury could find that the ice cream carton contained a metal object and that
20 this rendered the product unreasonably dangerous.

21 However, Wilson has presented no evidence in support of the second or third elements of
22 his claim. Wilson has not produced any evidence that Wal-Mart sold the allegedly defective ice
23 cream, let alone that this defect existed at the time it left Wal-Mart's control. The only evidence
24 that might link Wal-Mart to the allegedly defective ice cream (other than Wilson's statement) is a
25 receipt showing that *someone* purchased ice cream from Wal-Mart on February 10, 2011. The
26 receipt shows that the purchase was made in cash and lists no identifying information of the
27 purchaser. While the fact that Wilson was able to produce the receipt supports his claim that he
28 was the purchaser, he has produced no evidence corroborating his allegation that the ice cream he

1 bit into was from the same carton of ice cream he purchased two or three days earlier. Wilson did
2 not preserve or photograph the subject ice cream carton to show that it was, in fact, ice cream that
3 was sold at Wal-Mart stores.

4 Wilson's deposition testimony is not sufficient to create a genuine dispute of fact on this
5 point. Although Wilson testified that remembered purchasing the ice cream at Wal-Mart, this
6 statement lacks any supporting facts or corroborating evidence and is contradicted by other parts
7 of his testimony. For example, Wilson testified that he originally brought this suit against Vons
8 and Lucerne Foods because he thought the ice cream had come from those entities. He also testified
9 that he sometimes shopped at 7-Eleven in addition to Wal-Mart during the time period in question.
10 Further, Wilson has not produced any evidence from a witness—such as his roommate Jack or one
11 of the other people with access to his apartment—who could verify that the ice cream came from
12 a Wal-Mart store or was a brand sold by Wal-Mart. In addition, Wilson provided testimony that
13 the ice cream was in his freezer for two to three days before he opened it to serve himself the ice
14 cream and that Jack and multiple other people had access to the freezer. This testimony reinforces
15 Wal-Mart's argument that Wilson has not shown the existence of any alleged defect at the time
16 the ice cream left Wal-Mart's control. Wilson's statements to the contrary in his deposition are not
17 sufficient to create a genuine issue of material fact. See Villiarimo v. Aloha Island Air, Inc., 281
18 F.3d 1054, 1061 (9th Cir. 2002) (stating that the Ninth Circuit "has refused to find a genuine issue
19 where the only evidence presented is uncorroborated and self-serving testimony") (internal
20 quotation marks omitted); F.T.C. v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1171 (9th Cir.
21 1997), as amended (Apr. 11, 1997) ("A conclusory, self-serving affidavit, lacking detailed facts
22 and any supporting evidence, is insufficient to create a genuine issue of material fact."). Therefore,
23 Wilson has not produced evidence from which a jury could reasonably conclude that Wal-Mart
24 ever had control of the subject ice cream or, if it did, that the defect existed at the time the ice
25 cream left Wal-Mart's control.

26 Wilson also has not produced sufficient evidence from which a jury could conclude that he
27 was injured on the date in question or that the alleged defect caused his injuries. Although Wilson
28 alleges that biting into the metal caused one of his teeth to crack, he has presented no witness

1 statements, medical records, or other documentary evidence supporting the assertion that he
2 suffered an injury to his teeth on or around the date of the incident. Wilson also has produced no
3 evidence to corroborate his testimony that the metal *caused* the injury to his tooth. For example,
4 Wilson has produced no photographs or statements from any time period close to the incident date
5 that would corroborate that he suffered an injury to his teeth at that time. The only evidence Wilson
6 presents to corroborate his own statement are two dentist reports indicating that he has problems
7 with his teeth that *could have* been caused by biting into metal. Assuming that these documents
8 would be admissible, the Court finds that they do not establish a genuine issue of material fact as
9 to causation. One dentist report is dated more than a year after the alleged incident, while the other
10 is dated more than three years after the incident. Based on this record, the Court finds that Wilson
11 has not produced any evidence from which a reasonable jury could find (a) that he suffered an
12 injury on the date of the subject incident, or (b) that the alleged defect in the ice cream caused that
13 injury. See Scott v. Harris, 550 U.S. 372, 380 (2007) (“Where the record taken as a whole could
14 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.”
15 (alteration in original) (internal quotation marks omitted).

16 17 18 **V. CONCLUSION**

19 For the reasons discussed above,

20 **IT IS ORDERED** that Plaintiff David Lawrence Wilson’s Motion to Amend Complaint
21 (ECF No. 76) is DENIED.

22 **IT IS FURTHER ORDERED** that Defendant Wal-Mart Stores, Inc.’s Motion for
23 Summary Judgment (ECF No. 67) is GRANTED.

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2 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Respond (ECF No. 79) and
3 Defendant's Motion to Strike (ECF No. 82) are DENIED AS MOOT.

4 The Clerk of Court is instructed to enter judgment in favor of Defendant and close this
5 case.

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7 DATED: April 19, 2016.



8 **RICHARD F. BOULWARE, II**
9 **United States District Judge**